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No. 84-17

In the Supreme Court of the United States

October Term, 1983

ROBERT KENT LAHODNY and
BARRY TARLOW,

Petitioners,

v.

PETER NUNEZ, DOUGLAS HENDRICKS,
JAMES CONKLIN, JAMES NIELSEN and
CARL OROZ,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In a *Bivens* civil rights action for injunctive and declaratory relief, does a complaint which alleges a wrongfully motivated, secret, post-indictment intrusion into the attorney-client relationship by the government prosecutor in conspiracy with his agents for the purpose of urging the criminal defendant to discuss the facts of his case, fire his attorney, plead guilty, and become a government informant and also threatening him with more serious charges if he does not cooperate, state a cause of action under the Fifth and Sixth Amendments even though the complaint fails to allege prejudice to the criminal defendant at his criminal trial?

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PETITION FOR WRIT OF CERTIORARI

This is a petition of ROBERT KENT LAHODNY and BARRY TARLOW for a Writ of Certiorari to review the order made by the United States Court of Appeals for the Ninth Circuit on December 21, 1983, affirming by a 2 to 1 vote the decision of the District Court which had dismissed petitioners' complaint for failure to state a cause of action. The Court of Appeals ruled that in order to sustain a *Bivens* cause of action for violation of the Sixth Amendment right to effective assistance of counsel, a plaintiff must prove that he was substantially prejudiced in the criminal case. The Court reached this decision despite the

fact that a criminal defendant, in the absence of actual prejudice, has no other remedy to prevent continuing government attempts to intentionally disrupt, destroy, and circumvent the attorney-client relationship.

OPINIONS BELOW

The Opinion in the United States Court of Appeals for the Ninth Circuit, affirming the District Court's decision, was a memorandum opinion not for publication. (A copy of the Opinion is attached as Appendix "A.")

JURISDICTION

1. On December 30, 1982, petitioners filed an amended complaint for injunctive and declaratory relief in United States District Court for the Central District of California. The complaint alleged that respondents engaged in a course of conduct designed to prevent petitioner Robert Lahodny from exercising his right to effective assistance of counsel. The complaint sought declaratory and injunctive relief, arising under the Fifth and Sixth Amendments to the Constitution, and Title 42 U.S.C. §1985(3) and §1986.

2. On January 31, 1983, a hearing on respondents' motion to dismiss the complaint for failure to state a cause of action was held before the Honorable Richard A. Gadbois, Jr., United States District Court Judge for the Central District of California. After argument, Judge Gadbois granted respondents' motion to dismiss the complaint, holding that before petitioners can state a cause of action for violation of their Fifth and Sixth Amendment rights under the Constitution, they must allege that the conduct complained of caused them prejudice. An order dismissing the action was entered on February 3, 1983. Respondents filed their Notice of Appeal on February 24, 1983.

3. On December 21, 1983, the United States Court of Appeals for the Ninth Circuit affirmed by a 2 to 1 vote the decision of the District Court. Petitioners sought further review of the Panel's Opinion by filing a petition for rehearing and a suggestion for rehearing en banc, both of which were rejected on April 6, 1984. (A copy of the Order rejecting the petition for rehearing en banc is attached as Appendix "B.")

4. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Title 42, U.S.C. §1985(3):

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by

such injury or deprivation, against any one or more of the conspirators.

4. Title 42, U.S.C. §1986:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

STATEMENT OF FACTS

In August 1982, petitioner Robert Lahodny was one of 27 persons accused in a criminal indictment of being part of a conspiracy to import marijuana into the United States. Lahodny retained petitioner Barry Tarlow to represent him. On September 12, 1982, Tarlow wrote a

letter notifying the prosecutor, Assistant United States Attorney Douglas Hendricks, of this representation and requesting that the prosecutor and any federal law enforcement agents not communicate with Lahodny.

The complaint alleges that in a series of secret, post-indictment meetings and conversations with government agents and with the prosecutor, Lahodny was continually urged to fire his lawyer, discuss the facts of the case, plead guilty and become a government informant. He was warned not to discuss these contacts with his lawyer Barry Tarlow. Lahodny was further warned and threatened that if he failed to cooperate with the government, he would be charged with a continuing criminal enterprise, in violation of 21 U.S.C. §848, a far more serious offense carrying a mandatory minimum penalty of 10 years imprisonment and a maximum of life imprisonment. The prosecutor was aware of, approved of, and ratified the conduct of his agents. Lahodny was told that if he agreed to cooperate and fire Barry Tarlow, the government would find him the "right lawyer."

Following an October 4, 1982, secret meeting with the government, Robert Lahodny informed Barry Tarlow about the government misconduct. Tarlow filed a motion to dismiss the indictment in the criminal case accompanied by a sealed affidavit alleging actual prejudice to his client. The criminal trial judge, Judith Keep, denied all of Barry Tarlow's requests for subpoenas and discovery. Judge Keep denied the motion because she found under *United States v. Morrison,* 449 U.S. 361 (1981), that Robert Lahodny did not establish he had been prejudiced.

Petitioners then filed this *Bivens* civil rights action alleging the facts stated above and seeking in the amended complaint injunctive and declaratory relief. Petitioners also alleged that interference with the attorney-client

relationship between Lahodny and Tarlow was part of an extensive pattern of conduct by the United States Attorneys office in San Diego designed to undermine and destroy the effectiveness of criminal defense counsel. The District Court dismissed the complaint because petitioner Lahodny failed to show that he was prejudiced during his criminal proceedings. This was affirmed by a divided Court of Appeals. Judge Reinhardt dissented from the majority's holding that the District Court correctly dismissed the claim for injunctive relief. Judge Reinhardt, noting that petitioner Lahodny was subsequently indicted for a violation of 21 U.S.C. §848,[1] found that "there is the real possibility that the government could engage in the alleged conduct again." He stated that the "majority's holding appears to make it impossible for a person to obtain an injunction against attempts to interfere with the attorney-client relationship unless such attempts have already been successful."

REASONS WHY THE WRIT SHOULD BE GRANTED

In *United States v. Morrison*, 449 U.S. 361 (1981), the Supreme Court held that absent a showing of prejudice, government interference with the Sixth Amendment right to counsel does not warrant the dismissal of an indictment against the defendant. *Id.* at 366-67. The Court, in arriving at this conclusion, did "not condone the egregious behavior of the Government agents." *Id.* at 367. The agents had met with the defendant without the knowledge or permission of her retained counsel in order to obtain her cooperation in a related investigation. They disparaged

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[1]The §848 prosecution is currently pending in United States District Court for the Southern District of California. *United States v. Lahodny*, No. 83-0789K. An appeal to dismiss the indictment on double jeopardy grounds is before the Ninth Circuit Court of Appeals. *United States v. Lahodny*, No. 83-5291.

the defendant's counsel, suggested that the defendant would be better represented by another attorney, and indicated that the defendant would gain various benefits if she cooperated but would face a stiff jail term if she did not. *Id.* at 362. Although the Court found no jurisdiction for interfering with the criminal proceedings against the defendant, *id.* at 366, it assumed a violation of the Sixth Amendment and strongly suggested that the violation might be remedied in "other proceedings," *id.* at 367.

Petitioners have done precisely what the Supreme Court suggested in *Morrison:* seek a remedy in non-criminal proceedings for an intentional, egregious violation of petitioner Lahodny's Sixth Amendment right to counsel. Petitioners have sought declaratory and injunctive relief against the same "egregious behavior" that the Supreme Court refused to condone in *Morrison.* 449 U.S. at 367. The issue for the Court is whether a *Bivens*[2] civil rights action is an appropriate vehicle for remedying Sixth Amendment violations.

The courts of appeals are divided on the question of whether a criminal defendant must be prejudiced during criminal proceedings before a Sixth Amendment violation may be found. The Third, Eighth, and D.C. Circuits have concluded that the Sixth Amendment may be violated without a showing of prejudice, while the Ninth Circuit has held that prejudice must be shown. Nevertheless, the courts have uniformly condemned the clearly unethical actions of government agents and prosecutors who intentionally disrupt attorney-client relationships. Until a remedy is provided, this conduct will continue.

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[2]In *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 397 (1971), the Supreme Court held that a plaintiff can receive damages from federal agents who violate the plaintiff's Fourth Amendment rights. *Bivens* has been extended to provide a cause of action for violations of other constitutional rights.

If the Court refuses to grant certiorari to review this important issue, law enforcement agents will have a license to violate with impunity the rights of criminal defendants to effective assistance of counsel. As long as the government agents are unsuccessful in their attempts to destroy the attorney-client relationship, there will be no prejudice and sanctions imposed at the criminal trial will be precluded by *Morrison.* Disciplinary proceedings against law enforcement agents are an ephemeral, non-existent remedy because the Code of Professional Ethics does not apply to government agents and no external disciplinary board has the authority to regulate their conduct. Moreover, the disciplinary remedy against attorneys is slow, tedious, and often non-existent.

The Ninth Circuit Court of Appeals decision makes it "impossible for a person to obtain an injunction against attempts to interfere with the attorney-client relationship unless such attempts have already been successful." *Lahodny v. Nunez,* No 83-5674 (9th Cir. 1983) (Reinhardt, J., dissenting). If the government is successful in convincing the defendant to fire his lawyer and become an informant, then the criminal defendant will no longer want to protest and the disgruntled defense counsel will be most unlikely, and might lack standing, to protest. A *Bivens* civil rights remedy is necessary if the Sixth Amendment right to counsel is to be accorded any protection against intentional government misconduct.

ARGUMENT

A. RESPONDENTS' CONDUCT CLEARLY VIOLATED PETITIONER ROBERT LAHODNY'S RIGHT TO COUNSEL, REGARDLESS OF WHETHER IT PREJUDICED HIM AT TRIAL.

By urging petitioner Lahodny to plead guilty in the absence of his lawyer, the government engaged in improper plea bargaining with Lahodny and denied Lahodny his right to be represented at a critical stage of the proceeding. In *Commonwealth v. Manning*, 367 N.E.2d 635 (Mass. 1977), a government agent telephoned the defendant "without the knowledge or permission of counsel" in order "to induce the defendant to become an informer and to cooperate with the Federal agents in their ongoing investigation of traffic in narcotics." During the conversation, the agent "made several disparaging remarks about [the defendant's] counsel and the manner in which he was conducting the defense" of the case and "indicated that the tactics of defense counsel would not insure the defendant being kept out of jail." *Id.* at 636-37. The court condemned the agent for "attempting to plea bargain with the defendant behind the back of counsel" and found it to be a denial of the right of counsel. *Id.* at 638-39.

In *Anderson v. North Carolina*, 221 F. Supp. 930 (W.D.N.C. 1963), the defendant voluntarily entered into a plea agreement with the prosecutor in the absence of defendant's counsel. Defendant's counsel had agreed to his own absence. The conviction was set aside because the meeting denied the defendant his constitutional right to counsel at every stage of the proceeding. Whether counsel could have worked out a better deal for his client was deemed irrelevant. Because of counsel's absence, the proceedings were found to be constitutionally defective. *Id.* at 934-35; *see also Gallarelli v. United States*, 441 F.2d 1402, 1405 (3d Cir. 1971) (guidance of counsel is so

essential a protection for an accused during plea bargaining that a plea entered without such guidance must be set aside even absent a showing of demonstrable harm).

The fact that the government agents' conduct did not result in a plea does not negate the Sixth Amendment violation. In *People v. Moore*, 57 Cal. App. 3d 437, 129 Cal. Rptr. 279 (1976), the People contended that there was no plea bargaining because no plea was reached. The court found this argument "vacuous." The court stated that "the absence of a plea and the meager benefits [the defendant] received from his unaided bargaining, underscore the prejudicial effect of acting without counsel during crucial pretrial negotiations." The court concluded that the denial of defendant's right to representation of counsel at a critical stage of the proceedings—plea bargaining—violated the Constitution. *Id.* at 442.

In addition to urging petitioner Lahodny to plead guilty, the respondents engaged in other conduct that violated Lahodny's right to counsel. The government agents continually urged Lahodny to fire his lawyer, discuss the facts of the case, and become a government informant. Lahodny was told that if he agreed to cooperate and fire his lawyer, the government would find him the "right lawyer." The government contacts with Lahodny were made without petitioner Tarlow's knowledge or consent. Indeed, Lahodny was warned not to discuss these contacts with Tarlow. If Lahodny failed to cooperate with the government, the agents threatened to have him charged with a more serious offense for which he has since been indicted. A nearly identical set of facts was found in *United States v. Morrison*, 602 F.2d 529 (3d Cir. 1979), *rev'd on other grounds*, 449 U.S. 361 (1981), to be a "thoroughly unjustified and wrongly motivated interference with the attorney-client relationship," constituting a violation of the Sixth Amendment right to effective assistance of counsel. 602 F.2d at 533.

Because of the outrageousness of the government's conduct, as alleged in the petitioners' complaint, the issue of whether wrongfully motivated interference with the attorney-client relationship constitutes a Sixth Amendment violation regardless of prejudice is clearly raised. The Court will be able to resolve that question, which was left unanswered in *United States v. Morrison*, 449 U.S. 361 (1981), and also determine whether a *Bivens* action is an appropriate proceeding to remedy such a violation.

B. PRIOR CONDEMNATION OF THESE PRACTICES AS UNETHICAL HAS NOT REMEDIED THE PROBLEM.

These intentional post-indictment intrusions by the government violate legal ethics. Disciplinary Rule 7-104(A)(1) of the ABA Code of Professional Responsibility forbids a lawyer during the course of his representation of a client to:

> communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawer in that matter, unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Numerous court decisions have condemned this kind of unethical conduct by prosecutors.[3] At the same time,

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[3] *United States v. Partin*, 601 F.2d 1000, 1005 (9th Cir. 1979) ("we have condemned practices similar to that followed by" the prosecutor that "violated ABA Disciplinary Rule 7-104"; prosecutor communicated with defendant without defense counsel's knowledge); *United States v. Thomas*, 474 F.2d 110, 111 (10th Cir. 1973) ("the canons of ethics governing the actions of attorneys in all United States Courts in this circuit prohibit an attorney from communicating about the controversy with a party on the other side of the case who is represented by an attorney . . . even if the party agrees to be interviewed without his attorney present."); *United States v. Springer*,

however, courts have been reluctant to disturb criminal convictions unless there has also been substantial prejudice to the criminal defendant. *United States v. Morrison*, 449 U.S. 361, 366-67 (1981).

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460 F.2d 1344, 1355 (7th Cir. 1972) (Stevens, J., dissenting) (ethical code applicable to both civil and criminal cases); *United States v. Four Star*, 428 F.2d 1406, 1407 (9th Cir. 1970) ("We emphatically reiterate . . . that in-custody interrogation of an accused person known to be represented by counsel without affording counsel an opportunity to be present is undesirable. . . ."); *Shantz v. Eyman*, 418 F.2d 11, 13 (9th Cir. 1969) ("county attorney's attempt . . . to communicate directly with petitioner rather than with petitioner's counsel was a gross violation of professional ethics"); *Coughlan v. United States*, 391 F.2d 371, 376 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968) (the Canons of Professional Ethics "provid[e] that the attorney representing a plaintiff may not interview the defendant in the absence of his counsel concerning the facts of the case, even if the defendant is willing to discuss the matter"); *Ricks v. United States*, 334 F.2d 964, 970 n.18 (D.C. Cir. 1964) ("the Government conceded the truth of appellant's assertion that "[w]hen a defendant is represented by counsel, it is the practice of the United States Attorney not to permit any communication to be had by members of his staff or the police with the defendant except through or with the permission of counsel for the defendant"); *Lee v. United States*, 322 F.2d 770, 777 (5th Cir. 1963) ("[L]egal ethics forbid a United States Attorney or a Government agent to bypass the lawyer of a defendant fortunate enough to have means to engage counsel. This is a proper ethic for lawyers."); *United States v. Jamil*, 546 F. Supp. 646, 654 (E.D.N.Y. 1982) ("[a]ny direct communication between the Assistant United States Attorney, or a representative of his office, and the defendant occurring after the government became aware that he was represented by counsel would constitute a violation of the Code of Professional Ethics); *State v. Yatman*, 320 So. 2d 401, 403 (Fla. Dist. Ct. App. 1975) (knowing communication constitutes "grossest form of unethical conduct" by prosecuting attorney); *People v. Green*, 405 Mich. 273, 274 N.W.2d 448, 452 (1979) (dissent); *People v. Skinner*, 52 N.Y.2d 24, 30, 436 N.Y.S.2d 207, 209, 417 N.E.2d 501 (1980) ("We would be hard pressed logically to proscribe such conduct in the civil context yet blithely overlook it in the criminal sphere."); AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY, *Communicating With One Of Adverse Interest*, EC 7-18 and DR 7-104 comment, at 331, 339 (1979).

Condemnation of these practices as unethical has not put a halt to this blatant misconduct. Where these unethical contacts are intentional and for the purpose of interfering with, or destroying, the attorney-client relationship, they are also violative of the Constitution.[4] This Court should take this opportunity to declare that a *Bivens* cause of action exists for secret, intentional post-indictment intrusions by government agents for the purpose of encouraging a criminal defendant to discuss the facts of his case, plead guilty, fire his attorney, and become an informant.

As then-Judge Stevens wrote in dissent in *United States v. Springer,* 460 F.2d 1344, 1355 (7th Cir. 1972), about secret contact by FBI agents with a defendant in the absence of his counsel:

> In a civil context I would consider this behavior unethical and unfair. In a criminal context I regard it as such a departure from "procedural regularity" as to violate the due process clause of the Fifth Amendment.

Id. at 1355 (footnotes omitted).

C. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN CIRCUITS.

The decision of the divided panel of the Ninth Circuit Court of Appeals denying petitioners' cause of action for violation of the Sixth Amendment right to counsel because

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[4]An excellent discussion of the relationship between unethical conduct and violations of the Sixth Amendment, and a thorough review of prior caselaw, are found in the opinion of Judge Weinstein in *United States v. Jamil,* 546 F. Supp. 646 (S.D.N.Y. 1982). *Jamil,* however, does not involve a post-indictment intrusion in which government agents urge a criminal defendant to fire his attorney and plead guilty.

of no allegation of prejudice stands in sharp contrast to decisions in other circuits that have found a constitutional violation for intentional interference regardless of whether actual prejudice occurs.

In *Via v. Cliff*, 470 F.2d 271 (3d Cir. 1972), plaintiff was a prison inmate who alleged in a civil rights lawsuit under 42 U.S.C. §1983 that prison officials refused to allow him to communicate with his attorney. There was no prejudice to him in his criminal trial because the trial judge wisely recessed the trial to allow the lawyer and client to have their needed consultation. In reversing summary judgment for the defendants, the court held that if the interference by the defendants was "wrongfully motivated or without adequate justification," it violated the plaintiff's constitutional right to counsel. For recovery under section 1983, the plaintiff "need only establish actual infringement(s) of his right to counsel by defendant(s) acting under color of law. There is no requirement that [the plaintiff] show that his 'counsel's preparedness for trial was affected in any way.' " The court held that the plaintiff could maintain his cause of action "without alleging or proving prejudice to his defense at trial by the alleged actual infringements." *Id.* at 275 (footnote omitted).

In *United States v. Morrison*, 602 F.2d 529, 532 (3d Cir. 1979), *rev'd on other grounds*, 449 U.S. 361 (1981), the Third Circuit undertook a two-fold analysis of the government agents' conduct. First, the court addressed the question of whether there was a Sixth Amendment violation. Then the court addressed the question of what remedy should apply.

In *Morrison*, DEA agents visited the criminal defendant's home without knowledge or permission of her counsel and urged her to fire her attorney, plead guilty and become a government informant. On facts nearly identical to those framed in petitioners' complaint, the Third

Circuit found "a pattern of conduct calculated to intrude upon and destroy the attorney-client relationship." *Id.* at 531. The court found that this conduct violated the Sixth Amendment because it was a "thoroughly unjustified and wrongly motivated interference with the attorney-client relationship." *Id.* at 533.[5] In reversing *Morrison*, the Supreme Court addressed itself only to the appropriate remedy and assumed that the Sixth Amendment was violated in the case. 449 U.S. at 364.

In *Wounded Knee Legal Defense/Offense Committee v. FBI*, 507 F.2d 1281 (8th Cir. 1974), the plaintiff sought an injunction under 28 U.S.C. §1331 seeking to bar the FBI from harassing or intimidating its members and from interfering with their activities. Plaintiff was an organization formed to provide free legal aid to defendants in the criminal cases which followed the occupation of Wounded Knee, South Dakota, by militant American Indians. In finding that plaintiff committee had standing to assert the Sixth Amendment rights of its Indian clients, the court wrote:

> It requires no citation of authorities to reaffirm our historic commitment to effective assistance of counsel in criminal cases. That right may not be fettered by harassment of government officials and any claim which factually asserts such harassment presents a federal question for our determination.

Id. at 1284. *See also Chrisco v. Shafran*, 507 F. Supp. 1312, 1318 (D. Del. 1981) (if plaintiff can prove that defendants "purposefully interfered with his right to counsel he can recover damages under [42 U.S.C. §]

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[5]In reaching this conclusion, the Third Circuit distinguished *Weatherford v. Bursey*, 429 U.S. 545 (1977), which did not involve an intentional attempt to undermine and destroy the attorney-client relationship. 602 F.2d at 532.

1983 without proving that this conduct prejudiced him at a subsequent criminal trial).

Following *Morrison*, other courts have found a violation of the Sixth Amendment right to effective assistance of counsel, even where no prejudice results and dismissal of the indictment is unwarranted. *Briggs v. Goodwin*, 698 F.2d 486, 497 (D.C. Cir.), *vacated on other grounds*, 712 F.2d 1444 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 704 (1984), specifically recognized a *Bivens* cause of action for violations of the Sixth Amendment right to effective assistance of counsel, even though there was no prejudice found. In that case, the plaintiffs had been acquitted of all criminal charges. 698 F.2d at 489. *See also United States v. Solomon*, 679 F.2d 1246, 1250 n.7, 1251 (8th Cir. 1982)(although "there is little doubt that . . . Solomon's Sixth Amendment rights were violated," reversal was not required because no evidence obtained from government agent conversations with the defendant in the absence of counsel were used against the defendant).

In contrast, the Ninth Circuit has held that the Sixth Amendment right to counsel is violated only when prejudice can be shown. The Ninth Circuit has stated: "The government intrusion into the attorney-client relationship, although not condoned by the Court, is not of itself violative of the Sixth Amendment right to counsel. Rather, the right is only violated when the intrusion substantially prejudices the defendant." *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980). *Accord United States v. Glover*, 596 F.2d 857, 864 (9th Cir.), *cert. denied*, 444 U.S. 857 (1979). The Court of Appeals in this case relied on *Irwin* and *Glover* in denying relief to the petitioners.

Irwin and *Glover*, however, are clearly distinguishable from the present case. The previous Ninth Circuit cases involved criminal defendants seeking dismissals of their indictments because of Sixth Amendment violations. In

the present case, petitioners are seeking civil remedies from constitutional violations. While the existence of prejudice is necessary before applying sanctions to criminal proceedings, it should not be determinative of whether a constitutional violation took place.

Because of the conflict between the circuits, the Supreme Court should grant certiorari.

D. IF THE COURT OF APPEALS DECISION IS ALLOWED TO STAND, PETITIONERS WILL HAVE NO REMEDY FOR A SERIOUS GOVERNMENT VIOLATION OF THE RIGHT TO COUNSEL.

The Court of Appeals, like the Supreme Court in *Morrison*, 449 U.S. at 367, did "not condone the egregious conduct" alleged in the complaint and suggested that petitioner seek a remedy elsewhere:

> If the government agents' meetings with Lahodny, in the absence of Tarlow's knowledge or permission, violated the Code of Professional Responsibility DR 7-104(A)(1), nothing in our holding precludes Lahodny and Tarlow from asking to remedy that conduct in a disciplinary proceeding.

Lahodny v. Nunez, No. 83-5674 (9th Cir. 1983).

The Code of Professional Responsibility has no application whatsoever to the respondents James Conklin, James Nielsen and Carl Oroz. They are DEA and IRS agents, not lawyers. The Court's opinion gives them absolute license to try to destroy any attorney-client relationship they want. There is no court action, civil or criminal, which stands in their way. And, as long as their secret dealings with and pressure tactics upon a criminal defendant do not involve putting the prosecutor on the phone or

bringing him to a meeting, no one has to face any consequences for this "egregious misconduct."

State bar disciplinary proceedings have been totally ineffective as a remedy against this kind of misconduct by attorneys. This is particularly true in California. According to a newspaper article in a San Diego paper, the California State Bar's disciplinary system "is both lenient and slow" and "the backlog of complaints considered worthy of investigation goes back to 1976." Standefer, *Judges Disbar Convicted Attorneys,* San Diego Union, January 7, 1984. Since *Morrison* precluded the use of sanctions in criminal proceedings as a remedy against non-prejudicial violators of the Sixth Amendment and disciplinary measures are clearly ineffective, a *Bivens* civil rights action is the only way to deter and prevent intentional government interference with the attorney-client relationship.

CONCLUSION

For the above-mentioned reasons, petitioners ROBERT KENT LAHODNY and BARRY TARLOW respectfully request that this Honorable Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

BARRY TARLOW

JOSEPH G. BLOCK

Attorneys for Petitioners
Lahodny and Tarlow

Annexed:

"A" Opinion of the Court Below - filed December 21, 1983

"B" Denial of Petition for Rehearing and Suggestion for Rehearing En Banc - filed April 6, 1984.

APPENDIX

APPENDIX "A"

A1

FILED
DEC 21 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT KENT LAHODNY, BARRY TARLOW,

Plaintiffs-Appellants,

v.

PETER NUNEZ, DOUGLAS HENDRICKS, JAMES CONKLIN, JAMES NIELSEN and CARL OROZ,

Defendants-Appellees.

CA No. 83-5674

DC No. 82-5592 -RG

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, District Judge, Presiding
Argued and submitted October 5, 1983

Before: FARRIS and REINHARDT, Circuit Judges, and SOLOMON,** District Judge.

Lahodny and his former attorney Tarlow appeal the district court's dismissal of their complaint for failure to state a cause of action. Lahodny and Tarlow brought a *Bivens* civil rights action alleging that government agents had knowingly made post-indictment contacts with

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit.

**The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Lahodny, without the knowledge or permission of Tarlow. The complaint alleges that government agents urged Lahodny to fire Tarlow and become a government informant. Government agents allegedly threatened to charge Lahodny with a more serious offense if he failed to comply with the government agents' demands. Lahodny and Tarlow argue that this intentional interference with their attorney-client relationship violated their Sixth Amendment right to the effective assistance of counsel. They sought injunctive and declaratory relief.

We agree with the district court that Lahodny and Tarlow have not stated sufficient facts in their complaint to show that there was a denial of the effective assistance of counsel. Not all governmental interferences with the attorney-client relationship violate the Sixth Amendment right to counsel. *Weatherford v. Bursey,* 429 U.S. 545 (1977); *United States v. Irwin,* 612 F.2d 1182 (9th Cir. 1980); *United States v. Glover,* 596 F.2d 857 (9th Cir.), *cert. denied,* 444 U.S. 857 (1979). The government did not attempt to introduce evidence at trial that was improperly obtained from governmental intrusion into the attorney-client relationship. *See Schantz v. Eyman,* 418 F.2d 11 (9th Cir.), *cert. denied,* 397 U.S. 1021 (1969). Nor did the government improperly obtain and use confidential information regarding defense strategy. *See Irwin, supra,* 612 F.2d at 1187.

There is nothing in the complaint to indicate that the government's conduct denied Lahodny the effective assistance of counsel. Lahodny and Tarlow allege that government agents disparaged Tarlow and urged Lahodny to fire Tarlow. However, Lahodny continued to retain Tarlow. There is no allegation that Lahodny's confidence in Tarlow was shaken or that Tarlow's effective defense on behalf of Lahodny was in any way hindered.

Neither have Lahodny and Tarlow specifically sought to enjoin future interference with their Sixth Amendment rights. Although they claim that government agents have continued the allegedly unconstitutional practices with others, they seek merely "to enjoin defendants from engaging in activities *declared* to be unconstitutional." The only alleged threatened interference is the government's threat to prosecute Lahodny for an additional charge. While Lahodny was later indicted for this offense, prosecutors retain a broad discretion in determining what to charge, and the Sixth Amendment right to counsel is not violated by a prosecutorial decision to charge an additional offense.

In affirming the district court we do not condone the egregious conduct that has been alleged. If the government agents' meetings with Lahodny, in the absence of Tarlow's knowledge or permission, violated the Code of Professional Responsibility DR 7-104(A)(1), nothing in our holding precludes Lahodny and Tarlow from seeking to remedy that conduct in a disciplinary proceeding.

We hold only that the government agents' mere attempt to interfere with the attorney-client relationship does not rise to a constitutional violation.

AFFIRMED.

FILED
DEC 21 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

LAHODNY V. NUNEZ, No. 83-5674

REINHARDT, J., concurring in part, dissenting in part.

Because the plaintiffs do not allege, and obviously could not prove, that the government's unwarranted conduct "substantially prejudiced" Lahodny's sixth amendment right to counsel, *see United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980), I concur in the majority's affirmance of the district court's dismissal of the plaintiffs' claim for declaratory relief. However, I dissent from the majority's holding that the district court correctly dismissed the claim for injunctive relief. Instead, I believe that the district court's dismissal for failure to state a claim for injunctive relief should be reversed.

Even though the plaintiffs do not allege facts sufficient to state a claim for *declaratory* relief for past sixth amendment violations, it is premature to dismiss, on the basis of the pleadings and a few other materials, the plaintiffs' claim for *injunctive* relief against future action by the United States Attorney that allegedly is designed to interfere with Lahodny's sixth amendment rights. Plaintiffs allege, and support the allegation with declarations, that the challenged conduct is continuing and part of a pattern of conduct engaged in by the United States Attorney that will persist unless enjoined. If after further proceedings plaintiffs cannot demonstrate a substantial likelihood that a sixth amendment violation would result, then judgment could be granted for the defendants on the claim for injunctive relief. At this early stage of the proceedings, however, when the district court had only the pleadings and declarations to consider, dismissal of the claim for injunctive relief was not appropriate; nor on the basis of the record would summary judgment have been.

The majority's holding appears to make it impossible for a person to obtain an injunction against attempts to interfere with the attorney-client relationship unless such attempts have already been successful. That result seems to be problematic at best. When, as here, there are allegations of continuous egregious conduct on the government's part, I see no basis for dismissing a claim for injunctive relief. Moreover, because Lahodny has been indicted on a charge of continuing criminal enterprise under 21 U.S.C. § 848 (1976), there is the real possibility that the government could engage in the alleged conduct again.

For these reasons, I believe that the majority erred in holding that the district court correctly dismissed the plaintiffs claim for injunctive relief.

FILED
APR 06 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

APPENDIX "B"

A7

ENTERED
APR 19 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

FILED
APR 17 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT KENT LAHODNY, BARRY TARLOW, Plaintiffs-Appellants, v. PETER NUNEZ, DOUGLAS HENDRICKS, JAMES CONKLIN, JAMES NIELSEN and CARL OROZ, Defendants-Appellees.	CA No. 83-5674 DC No. 82-5592-RG (Central California) ORDER

Before: FARRIS and REINHARDT, Circuit Judges, and SOLOMON,* District Judge.

Judge Farris and Judge Solomon have voted to deny the petition for rehearing. Judge Reinhardt has voted to grant the petition.

Judges Farris and Reinhardt have voted to reject the suggestion for rehearing en banc and Judge Solomon recommends rejection of the en banc suggestion.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc in rejected.

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on July 5, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
1 First Street, N.E.
Washington, D.C. 20543
(Original and 40 copies)

Solicitor General
Department of Justice
Washington, D.C. 20530
(3 copies)

Ronald K. Silver
Assistant United States Attorney
1100 United States Courthouse
312 N. Spring Street
Los Angeles, California 90012
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 5, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)

DEC 18 1984
ALEXANDER L. STEVAS
CLERK

(2)

No. 84-17

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT KENT LAHODNY AND BARRY TARLOW, PETITIONERS

v.

PETER NUNEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-17

ROBERT KENT LAHODNY AND BARRY TARLOW, PETITIONERS

v.

PETER NUNEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they are entitled to declaratory and injunctive relief on the ground that respondents — the United States Attorney for the Southern District of California, an Assistant United States Attorney, and several federal law enforcement officers — violated their Sixth Amendment right to counsel.

1. Petitioner Lahodny was indicted in the United States District Court for the Southern District of California for conspiracy to import marijuana into the United States. Petitioner Tarlow represented Lahodny in this criminal prosecution. Petitioners allege that in the months following the indictment, various government informants and law enforcement officials contacted Lahodny on several occasions and urged him to dismiss his attorney, to plead guilty, and to become an informant. E.R. 3-8.[1] Petitioners do not

[1] "E.R." refers to the Except of Record filed in the court of appeals. We have lodged a copy of this document with the Clerk of this Court.

suggest that Lahodny was persuaded to dismiss Tarlow or to become an informant or that the government agents' alleged importunings affected Lahodny's relationship with Tarlow (E.R. 1-13, 15).

On the basis of these allegations, petitioners filed a motion to dismiss Lahodny's indictment (E.R. 28-50). After a hearing, District Judge Keep denied the motion (E.R. 62-88). Judge Keep ruled that petitioners had failed to demonstrate prejudice and that dismissal of the indictment was not appropriate in the absence of such a showing (E.R. 71-74). In addition, although petitioners attempted to persuade Judge Keep to confine her ruling to the question of prejudice (see E.R. 86-88), Judge Keep stated: "[T]he court finds, number one, there is no showing at all of any government misconduct in this case concerning Mr. Lahodny" (E.R. 74). Judge Keep reviewed the evidence in detail, explaining how it supported this conclusion (see E.R. 76-84). When petitioner Tarlow pressed her to state that her findings concerned only whether there was prejudice and not whether the misconduct had occurred, Judge Keep stated (E.R. 87): "I review[ed] absolutely all the material in my mind very carefully and from everything else that I've seen, I pointed out to you that I've also seen no evidence of misconduct."

2. After Judge Keep's ruling, petitioner Lahodny pleaded guilty to the charges against him and was sentenced. He did not appeal the conviction based on his guilty plea. Instead, petitioners filed this action in the United States District Court for the Central District of California. They alleged a violation of the Sixth Amendment and sought declaratory and injunctive relief. The district court dismissed the complaint on the ground that it failed to allege that petitioners were prejudiced and that under the settled law of the Ninth Circuit, a showing of prejudice is necessary to make out a claim that the Sixth Amendment was violated (E.R. 15,

citing *United States* v. *Irwin*, 612 F.2d 1182 (9th Cir. 1980)). The court of appeals affirmed in an unpublished order (Pet. App. A1-A5). It explained (*id.* at A2-A3):

> We agree with the district court that Lahodny and Tarlow have not stated sufficient facts in their complaint to show that there was a denial of the effective assistance of counsel. Not all governmental interferences with the attorney-client relationship violate the Sixth Amendment right to counsel. *Weatherford* v. *Bursey*, 429 U.S. 545 (1977) * * *. The government did not attempt to introduce evidence at trial that was improperly obtained from governmental intrusion into the attorney-client relationship. * * * Nor did the government improperly obtain and use confidential information regarding defense strategy.
>
> There is nothing in the complaint to indicate that the government's conduct denied Lahodny the effective assistance of counsel. Lahodny and Tarlow allege that government agents disparaged Tarlow and urged Lahodny to fire Tarlow. However, Lahodny continued to retain Tarlow. There is no allegation that Lahodny's confidence in Tarlow was shaken or that Tarlow's effective defense on behalf of Lahodny was in any way hindered. [2]

3. a. Petitioners assert that this Court should decide the question whether a showing of prejudice is necessary to state a claim of a violation of the Sixth Amendment right to counsel. But however that question is resolved, petitioners'

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[2]Judge Reinhardt concurred in the affirmance of the district court's denial of declaratory relief but said that it was "premature to dismiss, on the basis of the pleadings and a few other materials, the plaintiffs' claim for *injunctive* relief against future action by the United States Attorney that allegedly is designed to interfere with Lahodny's sixth amendment rights" (Pet. App. A4).

claim is barred by collateral estoppel. Judge Keep specifically found that the misconduct that petitioners allege in this complaint had not occurred, and petitioners did not seek review of her ruling. Petitioners therefore are precluded from asserting in this case that such misconduct occurred. See *Allen* v. *McCurry*, 449 U.S. 90 (1980).[3]

We note that to the extent that petitioners' request for declaratory relief is an effort to undermine or challenge Lahodny's conviction, their action is barred for an independent reason: a judgment of criminal conviction may not be collaterally attacked through an action for declaratory and injunctive relief. The proper means of seeking collateral relief from a conviction, if such relief is available, is habeas corpus, coram nobis, or the statutory remedy provided by 28 U.S.C. 2255. Cf. *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

b. *i.* In addition, petitioners are incorrect in contending that the courts below erred in requiring a showing of prejudice as a necessary element of a Sixth Amendment claim. In *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), this Court held that the government did not violate the Sixth Amendment when it permitted an informant to attend meetings at which the defendant and his attorney discussed trial strategy, so long as the informant did not report what he heard to the prosecutors and the informant's attendance at the meetings did not prejudice the defendant in any other respect. *Weatherford* therefore establishes that, contrary to petitioners' contention, government "interference" in the relationship between a defendant and his attorney does not violate the Sixth Amendment unless the defendant is prejudiced. Moreover, last Term, in *United States* v. *Cronic*,

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[3]In both the district court and the court of appeals, the government argued that the effect of Judge Keep's ruling was to bar petitioners from relitigating the question whether the alleged misconduct had occurred. See E.R. 22-24; Gov't C.A. Br. 12-14.

No. 82-660 (May 14, 1984), the Court held that a Sixth Amendment violation based on a claim of ineffective assistance of counsel cannot be established without either an inquiry into an attorney's actual conduct of the trial or a showing of "circumstances [that] ma[k]e it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial" (slip op. 13; footnote omitted). In reaching this conclusion, the Court in *Cronic* stated that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated*" (slip op. 9-10; emphasis added).

Accordingly, *Weatherford* and *Cronic* make it clear that the Sixth Amendment has been violated only when a defendant can show — by reference either to the specific facts of the case or to valid general presumptions — that the challenged conduct had a prejudicial impact on his defense.[4] Petitioners do not even allege that the government's contacts with Lahodny prejudiced them, and they suggest no circumstances giving rise to a presumption of prejudice (see, *e.g.*, *Chadwick* v. *Green*, 740 F.2d 897, 901 (11th Cir. 1984); *Ricalday* v. *Procunier*, 736 F.2d 203, 209 (5th Cir. 1984)).

ii. Petitioners are also incorrect in asserting that this Court should resolve a conflict among the circuits on the question whether prejudice is a necessary element of a Sixth

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[4]See also *Massiah* v. *United States*, 377 U.S. 201, 206-207 (1964) (only the admission into evidence of statements obtained by questioning a suspect after the right to counsel had attached — not the questioning itself — violates the Sixth Amendment); cf. *Scott* v. *United States*, 436 U.S. 128 (1978); *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977).

Amendment claim. Petitioners rely (Pet. 15-17) on *United States* v. *Solomon*, 679 F.2d 1246 (8th Cir. 1982); *Wounded Knee Legal Defense/Offense Committee* v. *FBI*, 507 F.2d 1281 (8th Cir. 1974); and *Via* v. *Cliff*, 470 F.2d 271 (3d Cir. 1972).[5] But in *Solomon* and *Wounded Knee*, the courts of appeals neither specifically addressed nor squarely resolved the question raised by petitioners. The language quoted by petitioners from *Wounded Knee* (Pet. 16) is only a general discussion of the right to counsel and is plainly not directed to the question whether prejudice is a necessary element of a Sixth Amendment claim. In *Solomon*, where a criminal defendant alleged not just that law enforcement officers approached him but that they induced him to dismiss his attorney by retaliating against him for retaining the attorney (see 679 F.2d at 1249), the court of appeals only "assume[d,]" for "purposes of argument, * * * that the government's conduct constituted a Sixth Amendment violation" (*id.* at 1250 n.7). Moreover, in *Solomon* the defendant was seeking to overturn his criminal conviction on the basis of the alleged Sixth Amendment violation; *Solomon* does not reveal how the Eighth Circuit would view a claim seeking declaratory and injunctive relief for an alleged violation of the Sixth Amendment.

In *Via*, the court of appeals did appear to hold that a party could show a violation of the Sixth Amendment without establishing prejudice, but *Via* was also not an action seeking declaratory or injunctive relief. Moreover, *Via* antedates both *Weatherford* and *Cronic*. In view of those decisions, it is far from certain that the Third Circuit

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[6]Petitioners also cite two decisions that cannot create a conflict because they have no precedential significance — *United States* v. *Morrison*, 602 F.2d 529 (3d Cir. 1979), rev'd, 449 U.S. 361 (1981), and *Briggs* v. *Goodwin*, 698 F.2d 486 (D.C. Cir.), vacated, 712 F.2d 1444 (D.C. Cir. 1983), cert. denied, No. 83-602 (Jan. 9, 1984).

would adhere to the position it took 14 years ago. Indeed, *Cronic* was decided subsequent to all of the court of appeals decisions on which petitioners rely, and the courts of appeals have not yet had an opportunity to develop its implications. In these circumstances, it is incorrect to say that there is a conflict among the circuits requiring resolution by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

DOJ-1984-12